NO. 47929-0-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

SHANNE THOMAS McKITTRICK,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Jack Frederick Nevin

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. THE RESPONDENT'S STATEMENT OF THE CASE FAILS TO COMPLY WITH RAP 10.3(a)(5) WHICH REQUIRES A FAIR STATEMENT OF THE FACTS.

Rules of Appellate Procedure (RAP) 10.3(a)(5) provides the requirements for the Statement of the Case:

> A fair statement of the facts and procedure relevant to the issues presented for review, without argument. Reference to the record must be included for each factual statement.

The Respondent's Statement of the Case fails to comply with RAP 10.3(a)(5) where it contains numerous misstatements of the facts.

The State claims that "[t]he dinner at Mr. Cooke's house was followed by a skinhead house party at Mr. Elliser's house." Brief of Respondent, citing RP 3/17, 16-23 (Wright) and RP 3/18, 81-84 (Cooke). Nowhere in the record cited by the State does Matthew Wright or Jeff Cooke describe the gathering at Eric Elliser's house as a "skinhead" party. In fact, when the prosecutor asked Wright if he talked to Elliser about "[a]nything related to skinhead business," Wright replied, "No." RP 3/17 at 15. When Wright said Elliser left to pick up Danny Harvester because Wright thought Cooke wanted to fight Harvester for avoiding him, the prosecutor asked if that had anything to do with "skinhead business," and Wright replied, "That was their business." RP 3/17 at 24. The prosecutor asked Wright again if Harvester was coming over for "skinhead business," and Wright replied,

"I'm not sure." RP 3/17 at 25. Furthermore, Wright said there were a lot of people at the house including "some kids." RP 3/17 at 20-21, 23. Cooke also said there were "kids from T-Town Punks" who were sitting around playing video games. RP 3/18 at 83. It does not appear that kids would be skinheads.

The State claims "[t]here was also an incident involving a potential 'boot party'- like punishment for a skinhead who was not involved in the stabbing, Danny Harvester, citing RP 3/17, 24 (Wright) and RP 3/18. 85-90 (Cooke). Brief of Respondent at 7. Nowhere in the record cited by the State does Wright or Cooke say there was going to be a "boot party-like punishment" for Harvester. Despite the prosecutor's relentless questioning of Wright, he did not say that Harvester was being brought to Elliser's house for skinhead business:

> Q. So you don't know why it is that Eric Elliser left to go get Danny Harvester?
> A. I think One Eye wanted to fight him.[1]
> Q. What was the reason One Eye wanted to fight Danny Harvester?
> A. Because he was avoiding him.
> Q. Did it have anything to do with skinhead business?
> A. That was their business.
> Q. Was Danny Harvester going to receive a punishment for a violation of the skinhead --
> [DEFENSE COUNSEL]: Leading, your Honor, calls for speculation.
> THE COURT: I'll invite you to rephrase.

[1] Cooke was known as "One Eye."

Q. Was the purpose for bringing Danny Harvester over there related to punishment for some infraction in the skinhead business?
[DEFENSE COUNSE]: Leading.
THE COURT: I appreciate the posture you find yourself in, I'll sustain the objection and ask you to attempt open-ended questions. Then if you find yourself in an opposite position, we can take it up. But for now, I'll sustain the objection.
Q. Was One Eye going to violate Danny Harvester?
[DEFENSE COUNSE]: Objection, your Honor, leading.
THE COURT: I'll overrule that objection.
A. I'm not sure what he was going to do with him.
Q. But to your knowledge, did Danny Harvester coming over there have to do with skinhead business?
. . . .
A. I'm not sure.

RP 3/17 at 24-25.

When the prosecutor asked Cooke if "there were plans for some skinhead business related to Danny Harvester," Cooke replied, "Not really planned." RP 3/18 at 91. Cooke said that when Harvester arrived, he had a private conversation with him about using methamphetamine and he accepted Harvester's response that he was not using drugs. RP 3/18 at 91. Then the prosecutor asked Cooke about the punishment for that type of behavior:

A. Generally a fight. A one-on-one, most of the time a one-on-one fist fight.
Q. Have you heard the term boot party?
A. Yes.
Q. Explain to the jury what that is?

A. It's generally when on skinhead is disciplined by one or many other skinheads.
Q. What's involved in it?
A A fight and getting kicked, punched, pretty much fighting.
Q. Is that what was going to happen to Danny Harvester?
A. Some people don't have the same outlook on the drug thing. Mine was because I have been clean for so long, I made it a big point. It was really big for me. So pretty much for me, that's what I figured it considered, you know.
Q. And were you taking it upon yourself to administer the punishment?
A. Yeah. I told him, if you're high, we're going to fight, yeah, I guess.
Q. Did that end up happening that night?
A. No.

RP 3/18 at 92-93.

As Cooke explained, warning Harvester that he would fight him if he was on drugs was based on Cooke's personal belief, not skinhead culture.

The State claims that "[a]s Wagner was leaving to go back to Mr. Cooke's house, Mr. McKittrick chased him down. By recklessly driving up behind Mr. Cooke's car he conveyed to them that he wanted to fight Mr. Wagner." Brief of Respondent at 9, citing RP 3/17, 34-37 (Wright) and RP 3/18, 6-8 (Cooke). The State apparently meant to cite RP 3/19, 6-8 which contains Cooke's testimony. In any event, neither Wright nor Cooke said McKittrick conveyed that he wanted to fight Wagner. To the contrary, Cooke testified that it was Wagner who kept yelling at him to pull over because he wanted to fight McKittrick:

> And he's like, I don't know why you're stressing, I would have fought. The bug comes up and Derek tells me, pull over, I'm not afraid, I'll get down with the dude, pull over, pull over. . . . I go one block past, and going down Alaska Street, there's these where the crosswalks are at, they're like mini-islands, you can't just turn real fast and hit somebody if they're walking across the street, they're like little dividers. Derek pushes the wheel says, I'm not afraid to fight, pushes the wheel a little bit in the Scion and it reacts real fast, so I swerve to miss one of these crosswalk things. So doing that, I end up turning on 45th. And I go up 45th and he's still yelling in the seat, just over pull over, pull over, I'll fight, blah, blah, blah, so I turn on the corner of 45th and stop the car, I said, screw it, go ahead then.

RP 3/19 at 7-8.

Likewise, Wright testified that Wagner told Cooke to "pull over, I'm going to get out and beat his ass, fight him." RP 3/17 at 34. McKittrick and his girlfriend were in the car behind them, but Wright did not know who was driving. RP 3/17 at 34-35, 37. Cooke thought that Melissa Bourgault was driving because when he got out of his car, he saw McKittrick standing outside the passenger side of the Volkswagen. RP 3/19 at 10-11.

The State claims that Wagner and McKittrick were circling each other until Elliser arrived and "joined in and at that point, when Mr. Wagner was outnumbered two to one and boxed in against a hedge, the stabbing of Wagner occurred." Brief of Respondent at 10, citing RP 3/19, 12-21 (Cooke). A review of the record reveals that Cooke referred to a diagram and pointed out that there was a hedge behind Wagner and McKittrick and when Eliser arrived, he was on the other side of Wagner. RP 3/19 at 14-18.

Cooke never said McKittrick and Eliser outnumbered Wagner two to one and "boxed him in" against the hedge. Cooke "couldn't see anything" because it was too dark. RP 3/19 at 17. Cooke heard Wagner call for his help and about the same time, McKittrick said "what's in your hand, or, put down what's in your hand." RP 3/19 at 18.

The State claims that Mr. Wright "agreed" with Mr. Cooke that Mr. Wagner "did not have the knife in his hand." Brief of Respondent at 10, citing RP 3/17, 37 (Wright) and RP 3/19, 9-11 (Cooke). Neither Wright nor Cooke testified that Wagner did not have a knife in his hand. Wright said he did not think Wagner had anything in his hand and Cooke said Wagner "had his hands up." RP 3/17 at 37 and RP 3/19 at 11.

The State claims that "Mr. Wagner's body appeared to have been rolled over; he was found face up with three stab wounds in his chest but with a large blood stain next to his body according to the lead detective." Brief of Respondent at 12, citing RP 4/14, 117-22 (Reopelle). However, the record cited by the State reflects that Detective Reopelle testified only about the blood stain:

> Q. And when you examined the body, did you note anything of evidentiary significance in the area around the body?
>
> A. I did. There was a -- there was a rather large blood stain to the north of the body, north of his torso, just on the side of the body (indicating). It was fairly heavy, and it was about one foot in diameter, and it appeared to me that the body had

> been laying in that spot for some time. And so, I -- I saw the blood stain. It was raining hard at the time. Detective Nist had been assigned to do the crime scene, so I contacted her, and I wanted to make sure to point out the blood stain to her, which I did. She observed it and then, before we could get it documented through photographs or anything like that, the -- it had started to rain so heavy that the blood stain just dissipated. It was just on the leaves of the grass.

RP 4/14 at 117-18.

The State claims, "The medical examiner's investigation provided details as the stabbing and the deadly effect of the three stab wounds. The medical examiner testified that the cause of death was multiple stab wounds." Brief of Respondent at 12, citing RP 3/26, p. 81 (Clark). The State's version of the facts is misleading because it omits the rest of Dr. Clark's testimony where he concluded that Wagner died as a result of stab wound number one:

> Q. Now, these last questions that I have for you, I will ask each of them, whether or not you can give your opinion to a reasonable degree of medical certainty. First question to that standard is based on your experience and training as a forensic pathologist, based on your having conducted the autopsy and having reviewed the toxicology report, do you have an opinion to that degree of certainty as to the cause of death of Derek Wagner?
> A. Yes.
> Q. What is that opinion, please?
> A. He died as a result of multiple stab wounds.
> Q. And can you explain why it is that that is the cause of death?
> . . . .
> A. As I indicated yesterday, the presence of blood in the chest and in the pericardial space provides beyond a shadow of a doubt that he was alive when this injury was inflicted. The

presence of 200 cc of blood in the pericardium over a short period of time. *That proves that he died as a result of the stab wound.*

Q. *That would stab wound number one*?
A. *Yes.*
Q. Do you have an opinion to a reasonable degree of medical certainty as to *whether he died as a result of stab wound number three*?
A. *He did not die of stab wound number three* because it would be a much slower process than stab wound number one.
Q. Same with respect to *stab wound number two*?
A. *He did not die as a result of stab wound number two.*

RP 3/26 at 81-82. (emphasis added).

Using a diagram, Dr. Clark pointed out that he numbered the stab wounds for convenience, but the numbers do not indicate the order of infliction. He explained that number one is the stab wound to the heart, number two is the stab wound to the liver and stomach, and number three is the stab wound to the abdomen. RP 3/25 at 161-63; Ex. 270.

The Respondent's Statement of the Case does not constitute a "fair" statement of the facts.

2. THE TESTIMONIES OF WRIGHT AND COOKE, EVEN WITH REASONABLE INFERENCES, DID NOT ESTABLISH THE FACTS ASSERTED BY THE STATE.

The State cites to the testimonies of Wright and Cooke, asserting that their testimony, together with reasonable inferences, established certain "facts." Brief of Respondent at 29-30. The State's version of the "facts" is unsubstantiated by the record.

a. Wagner was not "targeted and baited at the party concerning the affair," as claimed by the State. Brief of Respondent at 29, citing RP 3/17, pp. 27-28; RP 3/18, pp. 112-21. The record reflects that when the prosecutor asked Cooke to describe the tension between Wagner and McKittrick, he said the arguing went back and forth:

> A. I[t] was just still little comments. It would be fine for a minute, we wouldn't pay any attention, or Derek wouldn't pay no attention and Shanne didn't pay Derek no mind, and then it would be little comments like, if my comrade was here -- and then they'd start going at it again, talking shit to each other or Derek said, you know, like, if somebody's got something to say about it, say it to me, stuff like that. But it wasn't like until we were about to leave is when stuff started getting crazy.

RP 3/18 at 112-13.

b. The State asserts that when Wagner and Cooke left, "Mr. McKittrick chased them down in an aggressively driven car and thereby signaled that he wished to engage in hand to hand violence against Wagner, citing RP 3/19, p. 6-8. The record reflects that Cooke said the Volkswagen came up behind him with high beams on, which in no way signals that McKittrick wanted to "engage in hand to hand violence against Wagner." Cooke's testimony in fact established that it was Wagner who wanted to fight McKittrick, telling him to "pull over, I'm not afraid, I'll get down with the dude, pull over, pull over." RP 3/19 at 7-8.

c. The State asserts that "Wagner got out of the car and circled with Mr. McKittrick with his hands up, without fighting him and without a knife but was eventually cornered against a large hedge when Mr. Elliser arrived and joined in," citing RP 3/19, p. 9-14 (Cooke). The record reflects that Cooke did not see Wagner holding the knife when they were circling each other, but Wagner grabbed Cooke's Ka-Bar knife as he was getting out of the car and tucked it into the back of his pants. RP 3/19 at 9. There was a large hedge behind Wagner and McKittrick where they were circling each other. When Elliser came, he "went in the situation and went to go grab" Wagner. RP 3/19 at 16-17. Cooke explained that he "couldn't see anything. This whole area, the light lights up this part of the street where the light for the streetlight is and the sodium light kind of shines out from the hedge, this whole area right here is dark." RP 3/19 at 17. He never said that both McKittrick and Elliser "cornered" Wagner against the hedge.

d. The State asserts that "[a]t the moment of the stabbing, Wagner was cornered by two knife-armed men," citing RP 3/18, p. 101-04, which is absolutely unsubstantiated by the record. Cooke testified that he did not see McKittrick or Elliser with a knife on the night of the stabbing, although they all carry knives. He never said that McKittrick and Elliser were armed with knives and cornered Wagner "at the moment of the stabbing." RP 3/18 at 101-04.

e. The State asserts that "[w]ith at least one knife wound in his chest," Wagner fled from the defendants, citing RP 3/25, p. 161-66 (Clark); RP 3/26, p. 62-66 (Clark) and that the defendants stabbed Wagner "three times in the chest." To the contrary, Dr. Clark clearly explained that Wagner was stabbed in three different parts of the body: the "left chest cavity" which terminated in the "left ventricle of the heart," the "abdominal cavity but did not critically strike an organ," and "briefly through the liver and then into the stomach." 3/25 at 161-63. Dr. Clark concluded that the fatal stab wound to the heart occurred before the stab wound to the liver and stomach, but he could not determine whether it occurred before or after the stab wound to the abdomen. 3/25 at 171; 3/26 at 66.

3. REVERSAL AND DISMISSAL IS REQUIRED BECAUSE THERE WAS INSUFFICIENT EVIDENCE TO PROVE BEYOND A REASONABLE DOUBT THAT McKITTRICK COMMITTED MANSLAUGHTER AND FELONY MURDER.

The State agrees that the jury could have inferred that Mr. Elliser personally inflicted the fatal stab wound or wounds whereas Mr. McKittrick inflicted a non-fatal wound. The State also agrees [t]hat argument is supported by substantial evidence," but it is unclear what the State means when it contends that substantial evidence also supports "a rational inference that Mr. McKittrick stabbed Mr. Wagner first." The State argues

further that the unreasonable aspect of Mr. McKittrick's argument is that stabbing a man in the chest is not sufficient evidence of participating in a stabbing death where the cause of death was "multiple stab wounds," citing RP 3/26, p. 81 (Clark). Brief of Respondent at 38.

What is troubling about the State's brief is that it repeatedly misstates and mischaracterizes Dr. Clark's expert testimony. As previously pointed out, Dr. Clark initially stated that Wagner died as a result of multiple stab wounds but clarified that he "worded the cause of death multiple stab wounds because there were three of them." RP 3/26 at 81-82. Dr. Clark concluded that Wagner died as a result of stab wound number one, not stab wounds two or three. RP 3/26 at 82. He described the fatal stab wound marked stab wound number one on a diagram:

> The track went briefly through the left chest cavity incising a rib, but did not actually touch the lung. The left lung did collapse, however, as a result of this injury and that chest cavity filled up with blood, probably from a combination of his incised rib and the fact that this injury went ahead to terminate in the left ventricle of the heart.

RP 3/25 at 161-62.

Despite the fact that Dr. Clark clearly concluded that Wagner died as a result of the stab wound through the chest to the heart, the State inexplicably continues to argue that the evidence was sufficient in an accomplice case where "Mr. Wagner was killed by multiple stab wounds

inflicted by one or the other or both of the defendants." Brief of Respondent at 38-39. Given the fact that Wagner died from the stab wound through the chest to the heart, there is insufficient evidence to prove beyond a reasonable doubt that McKittrick inflicted the fatal stab wound during the fight with Wagner. Moreover, the State's "two-person attack" accomplice liability argument fails because McKittrick was not charged as an accomplice in the first degree assault charge against Elliser and Mark Stredicke.[2] CP 355, 356 (Jury Instructions 35 and 36). The jury was instructed that only "Defendants Eric Michael Elliser and Mark Michael Stredicke are charged in Count Three with assault in the first degree." CP 357 (Jury Instruction 357). The record substantiates that there was absolutely no evidence that McKittrick was involved in the assault of Wagner in the Mimura's back yard or that Elliser stabbed Wagner during the fight.

Even when admitting the evidence as true and drawing all reasonable inferences therefrom, while viewing the evidence in the light most favorable to the State, no rational juror could have found that McKittrick caused the death of Wagner by stabbing him through the chest

[2] The State mistakenly relies on *In re Personal Restraint of Hegney,* 138 Wn. App. 511, 524, 158 P.3d 1193 (2007) and *State v. Walker*, 182 Wn.2d 463, 483, 341 P.3d 976 (2015), which have no application here. Brief of Respondent at 38.

to the heart. Reversal and dismissal is required because there was insufficient evidence to prove the essential elements of manslaughter and felony murder beyond a reasonable doubt.

4. REVERSAL IS REQUIRED BECAUSE THE TRIAL COURT ERRED IN GIVING THE FIRST AGGRESSOR JURY INSTRUCTION, WHICH NEGATED McKITTRICK'S CLAIM OF SELF-DEFENSE, WHERE McKITTRICK DID NOT PROVOKE WAGNER'S USE OF DEADLY FORCE.[3]

The State attempts to create a diversion by citing numerous cases that are not controlling authority in this case. Brief of Respondent at 39-52. Fatal to the State's argument is its failure to cite and distinguish *State v. Douglas*, where this Court established that a "first-aggressor instruction is appropriate when there is credible evidence that the defendant provoked the use of force, including provoking an attack that necessitates the defendant's use of force in self-defense." 128 Wn. App. 555, 563, 116 P.3d 1012 (2005)(citing *State v. Riley*, 137 Wn.2d 904, 909-10, 976 P.2d 624 (1999)). Contrary to the State's argument, nothing in the record substantiates that McKittrick provoked Wagner's use of deadly force. *See* Brief of Appellant at 25-31. The trial court erroneously gave the first aggressor instruction despite recognizing that McKittrick "may not have expected a knife, may

[3] For some unexplained reason, throughout its argument, the State refers to the first aggressor instruction as the "provocation instruction."

not have expected that he was going to have to use his knife, certainly didn't expect Mr. Wagner was going to pull a knife on him." RP 4/20 at 110.

The State makes the same unsubstantiated assertion that McKittrick "signaled in unmistakable terms that he wished to call out Wagner" and he "all but forced Cooke to pull over." Brief of Respondent at 45, citing RP 3/19, p. 6-11 (Cooke) and RP 3/17, p. 34-37 (Wright). Neither Cooke nor Wagner testified that McKittrick forced Cooke to pull over so he could confront Wagner. To the contrary, Cooke said Wagner repeatedly told him to pull over and pushed the steering wheel, causing Cooke to swerve to avoid hitting a median in the road. When Wagner kept yelling at him to pull over because he wanted to fight McKittrick, Cooke stopped the car. RP 3/19 at 7-8. Wright also said that Wagner tried to force Cooke to pull over because he wanted to fight McKittrick. RP 3/17 at 104.

To justify giving the first aggressor instruction, the State claims that this case is similar to *State v. Wingate*, 155 Wn.2d 817, 122 P.3d 908 (2005), where the trial court properly gave the instruction. Brief of Respondent at 46-48. The State's argument lacks merit where in *Wingate*, the Washington Supreme Court concluded that giving the first aggressor instruction was proper because "it was undisputed that Wingate was the only person to draw a gun and aim it at another person." 155 Wn.2d at 823. Unlike in *Wingate*, the evidence showed that Wagner was the one with a knife. Cooke testified

that as Wagner was getting out of the car, he grabbed Cooke's Ka-Bar knife and tucked it into the back of his pants. RP 3/19 at 9. Wright testified that Wagner was holding the knife and started charging McKittrick. Wright said Wagner wanted to fight McKittrick and came at him. RP 3/17 at 105-06. It is abundantly clear from the record that Wagner, not McKittrick, used unprovoked and unjustified deadly force.

The State argues further that the trial properly sustained the prosecutor's objection to defense counsel's closing argument because "to argue that 'you have to put yourself in his shoes' is an incomplete description of the jury instructions and of lawful self defense." Brief of Respondent at 41-42. However, the record reflects that before defense counsel told the jury to "put yourself in the shoes of the defendant," he correctly explained the jury instructions on self-defense:

> You've been given two definitions of self-defense. There are two standards. First standard of self-defense is called justified homicide, justifiable homicide. And there are, essentially, three things that involve justifiable homicide. That Shanne McKittrick reasonably believed that the person slain intended to commit a felony or inflict death or great personal injury. And when someone pulls this knife on you (indicating), I tell you right now, it is not unreasonable to believe that the person that had the knife, was pointing this knife at you, was willing to use this knife on you, intends to inflict great personal injury -- that may, indeed, want to kill you.
>
> That the defendant reasonably believed that it was imminent. If a man with that knife is running at you with that knife, or pulls that knife in the middle of a fight, it's imminent.

> And last, *that the defendant employed such force and means that a reasonably prudent person would use under the same or similar conditions as they reasonably appeared to defendant at the time of the incident.*

RP 4/22 at 23 (emphasis added).

Defense counsel's argument is consistent with *State v. Walden*, 131 Wn.2d 469, 474, 932 P.2d 1237 (1997), cited by the State. Brief of Respondent at 41. The trial court erred in sustaining the prosecutor's objections to defense counsel's argument where defense counsel correctly told the jury to "put yourself in the shoes of the defendant" after he explained the jury instructions on self-defense.

Reversal is required because the court's error in giving the first aggressor instruction, compounded by the court's error in precluding the jurors from placing themselves in McKittrick's shoes, "prevented him from receiving a fair trial." *Douglas*, 128 Wn. App. at 565.

5. REVERSAL IS REQUIRED WHERE THE TRIAL COURT ERRED IN ADMITTING UNDULY PREJUDICIAL EVIDENCE OF McKITTRICK'S AFFILIATION WITH A SKINHEAD GROUP AND ALLOWING EXPERT TESTIMONY OF SKINHEAD CULTURE THEREBY DENYING McKITTRICK HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

The State contends that "[t]o argue that no rational trial judge would have made the same ruling is unpersuasive" where the jury would not understand the motive that led to the stabbing without evidence of skinhead

culture. To support its argument, the State cites Cooke's testimony at trial, which is not relevant to determine admissibility. Brief of Respondent at 19-20. What is relevant is Cooke's testimony at the pretrial hearing because a trial court abuses its discretion if its decision "is manifestly unreasonable or based upon untenable grounds or reasons." *State v. Lamb*, 175 Wn.2d 121, 127, 285 P.3d 27 (2012)(quoting *State v. Powell*, 126 Wn.2d 224, 258, 893 P.2d 615 (1995). A trial court bases a discretionary decision on untenable grounds or makes it for untenable reasons if it rests on facts unsupported by the record. *State v. Quismundo*, 164 Wn.2d 499, 504, 192 P.3d 342 (2008).

During direct examination, Cooke testified about how infidelity is viewed in skinhead culture, but he ultimately said that infidelity is a personal matter:

> Q. Uh-huh. Let me backtrack a bit. Concerning infidelity with another Skinhead's wife, what would be the punishment that would be expected for that?
> A. Generally a -- your butt getting kicked up. Generally, yeah.
> Q. Similar to the transgression regarding meth?
> A. Yeah. It's frowned upon, but it's more of a personal thing. You know, it kind of puts everyone in a bad thing because you have to pick a side, or whatever, so most people let them figure it out when they see each other, you know.

RP 3/3 at 31-32.

When cross-examined, Cooke affirmed that the dispute between Wagner and Stredicke was not a skinhead matter:

Q. If somebody had been sleeping with your wife, would you have been upset?
A. Absolutely.
Q. Not a surprise that Mr. Stredicke was upset?
A. No.
. . . .
Q. So it was a personal matter between Mr. Stredicke and Mr. Wagner, not a skinhead matter?
A. Pretty much, yes.
. . . .
Q. To the best of your knowledge, it was not a skinhead issue, correct?
A. To the best of my knowledge.
Q. To the best of your knowledge it was a friendship issue, right?
A. Loyalty, yes.

RP 3/3 at 60-61, 81.

The trial court admitted evidence of skinhead affiliation to show motive based on Cooke's testimony, which does not support the court's ruling.

The State argues further that appellant suggests that the evidence related to motive was improperly admitted under *State v. Wingate*, 155 Wn.2d 817, 122 P.3d 908 (2005). The State recognizes that *Wingate* "concerned marital infidelity," but asserts that "it is not accurate to view it as a propensity evidence case," which is not appellant's argument. Brief of Respondent at 21. Appellant cited the facts in *Wingate*, where an affair and loyalty among friends led to an assault, to show that the State could have

effectively established motive without evidence of skinhead affiliation and skinhead culture. *See* Brief of Appellant at 35-36.

Importantly, the State ignores how the questioning of jurors during voir dire revealed that any probative value of the evidence was substantially outweighed by the danger of unfair prejudice because of embedded preconceptions about skinheads. *See* Brief of Appellant at 36-37. Evidence that skinheads resolve disrespect for skinhead codes with violence invited the jury to infer that because McKittrick is a skinhead, he must have a propensity for violence, which is precisely what ER 404(b) forbids.

The record belies the State's contention that "[i]ssues of skinhead culture were an inescapable part of the trial" because "the actions of the defendants can only be understood in light of knowledge of the community to which they and the victim alike were part of." Brief of Respondent at 22. The State failed to meet its "substantial burden" when attempting to bring in evidence as an exception to the general prohibition under ER 404(b). *State v. DeVincentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003).

The trial court abused its discretion in admitting evidence of skinhead culture and skinhead affiliation and allowing the expert testimony where its decision is unsupported by the record. McKittrick's convictions must be reversed because he was denied his constitutional right to a fair trial and the presumption of innocence.

B. CONCLUSION

For the reasons stated here, and in appellant's opening brief, this Court should reverse and dismiss McKittrick's convictions because the State failed to prove all the elements of manslaughter and felony murder beyond a reasonable doubt.

In the alternative, this Court should reverse McKittrick's convictions because the trial court erred in giving the first aggressor instruction and compounded the error by sustaining the State's improper objections to defense counsel's closing argument on self-defense.

Further, this Court should reverse McKittrick's convictions because the trial court abused its discretion in admitting irrelevant, unduly prejudicial evidence of skinhead culture thereby denying McKittrick his right to a fair trial.

In the event the State substantially prevails on appeal, this Court should exercise its discretion and not award costs because McKittrick remains indigent.

DATED this 22nd day of December, 2016.

Respectfully submitted,

/s/ Valerie Marushige
VALERIE MARUSHIGE
WSBA No. 25851
Attorney for appellant, Shanne Thomas McKittrick

DECLARATION OF SERVICE

On this day, the undersigned sent by email, a copy of the document to which this declaration is attached to the Pierce County Prosecutor's Office and Stephanie Cunningham, counsel for Eric Elliser.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 22nd day of December, 2016.

/s/ Valerie Marushige
VALERIE MARUSHIGE
Attorney at Law
WSBA No. 25851

MARUSHIGE LAW OFFICE

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